## SUBJECT INDEX


PAGE

I.

The evidence is insufficient ..... 2

II.

The Smith Act as construed and applied in this case, with respect to the issue of incitement to action does violate the First Amendment ..... 21

III.

The rulings on clear and present danger are contrary to the requirements of the First Amendment ..... 25

IV.

The instructions of the trial judge with respect to the meaning of "organize" were erroneous and violated the constitutional rights of petitioners ..... 29

V.

The commission of overt acts in furtherance of the conspiracy charge within the limitations period was not proved ..... 32

VI.

Petitioners were deprived of a fair trial ..... 36

VII.

Conclusion ..... 42

## TABLE OF AUTHORITIES CITED


CASES — PAGE

Fujimoto et al. v. United States, No. 13915, pp. 113-114, n. 4.... 19

Gitlow v. New York, 268 U. S. 652.....23, 24

United States v. Flynn, 216 F. 2d 354..... 41

United States v. Schneiderman, 320 U. S. 118..... 5

STATUTES

McCarran Act, Sec. 4(f).....3, 4, 5

United States Constitution, First Amendment.....17, 20, 22, 23, 35

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956.

No. 6.

OLETA O'CONNOR YATES, HENRY STEINBERG, LORETTA STARVUS STACK, FRANK EFROIM SPECTOR, ALBERT JASON LIMA, CARL RUDE LAMBERT, ROSE CHERNIN KUSNITZ, ERNEST OTTO FOX, BEN DOBBS, DOROTHY HEALEY CONNELLY, and FRANK CARLSON,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## PETITIONERS' REPLY BRIEF.

The object of this Reply Brief is to deal with the fundamental defects in the brief for the United States and to give a few examples of omissions or errors in the facts recited and argument advanced by respondent. No more is possible within the confines of a necessarily short reply brief. No more is necessary, it is respectfully submitted, for petitioners' position is otherwise fully stated in the Opening Brief on file herein.

## I.

## The Evidence Is Insufficient.

A. Petitioners' fundamental theory as to the sufficiency of the evidence can be summarized in three propositions:

1. Petitioners are *leaders* of the Communist Party on either a local, state or a national level with a long-time record of activity therein. They are not merely members and officers and therefore must be treated differently than individuals who are merely members and officers of the Communist Party (R. Br. p. 106).[1]

2. The Communist Party is an organization which is founded and which functions on the principles of Marxism-Leninism, which principles must be construed as advocating the overthrow of the government of the United States by force and violence (R. Br. p. 105).

3. By virtue of their long-time activity and leadership in the Communist Party, on whatever level, it must be inferred that petitioners (a) knew and understood that the "principles of Marxism-Leninism" mean the advocacy of the overthrow of the government of the United States by force and violence; (b) knew and understood that the Communist Party interpreted and applied the principles in the same way; (c) with such knowledge and understanding, petitioners became members and officers of the Party; (d) became part of a conspiracy within the organization to effectuate the aforesaid objective; and (e) had the specific intent to accomplish the overthrow of the government of the United States by force and violence as speedily as circumstances would permit.

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[1]The brief of the United States will be referred to herein as "R. Br." Petitioners' Opening Brief will be referred to as "P. Br."

Accordingly, the evidence introduced concerning the nature and character of the Communist Party can consist entirely of what individuals other than petitioners did and said in the Party and of the books and other documents circulated and used within the Party. Then, by the simple expedient of establishing that petitioners are long-time active leaders in a city or any other subdivision of the Communist Party, they can properly be found guilty of conspiring to advocate and teach the overthrow of the government of the United States by force and violence.[2] In addition, respondent argues that as to each of the petitioners there was sufficient evidence aside from evidence of "leadership" to permit the jury to find every essential ingredient of the offense charged in the indictment. We discuss, first, respondent's theory of inferred guilt from long-time membership and officership in the Communist Party. And then, second, respondent's view of the sufficiency of the record based on the so-called additional evidence. The untenable character of the latter position will perhaps explain why respondent relies so heavily on its first "theory."

B. As the following brief analysis will reveal, respondent's theory of imputed guilt is supported neither by the record, by the law, nor by common sense.

1. Although Section 4(f) of the McCarran Act is not mentioned in its Brief, respondent seeks to avoid the effect thereof by urging that petitioners are not *merely* members and officers of the Communist Party, but they are *leaders*. Respondent cannot avoid the consequences

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[2]On this theory, of course, every long-time active "leader" of any subdivision of the Communist Party can properly be found guilty of Smith Act violations by proving that Marxist-Leninist books are circulated and studied in the Communist Party.

of Section 4(f) by this semantic device. The reference in that section to officers of the Communist Party can reasonably be construed only as including those holding positions of leadership, *i.e.*, leaders of the Party. That section was designed to require proof of an individual's knowledge evidenced by his acts instead of permitting his mere connection with the Communist Party in any capacity to become the basis for drawing inferences of guilt.

Respondent asserts that it is not relying solely on the long-time membership and officership in the Communist Party of these petitioners (R. Br. pp. 105-6). Then the respondent proceeds to base every inference of guilt on such membership and officership. It is true that in this connection respondent refers also to its version of what the Communist Party advocates, but that adds nothing to the case against petitioners. It is petitioners' understanding and activities that are important, not what is contained in books or what others said or did outside of the presence and, so far as the record shows, any knowledge of the petitioners. Insofar as petitioners' activities and understanding are concerned, respondent's contention is that proof of long-time officership and membership (indicating leadership) is sufficient to support a verdict of guilt.

2. Even if petitioners could, as respondent contends, be held vicariously responsible because of evidence as to the nature and character of the Communist Party, respondent's thesis cannot be sustained. In discussing the nature and character of the Communist Party, respondent selects from the record only that evidence and those quotations which suit its purposes. In the ordinary case, it may be appropriate for the prosecutor on appeal to select clearly proved criminal conduct in support of the judgment of

conviction without regard to other evidence in the case. But where one essential element of a prosecutor's case is the accused's inferred knowledge and understanding of the principles, policies and program of an organization, there is no basis for assuming or inferring that petitioners had knowledge of certain writings or portions of writings circulated, or of certain things that were said within the organization, but not of others (for this purpose we assume, of course, that the drawing of any such inferences are not prohibited by Section 4(f) of the McCarran Act and by the constitutional inhibitions against the doctrine of guilt by association). In fact, the presumption of innocence to which petitioners, like all other defendants in criminal cases, are entitled would seem to require the inference of knowledge of the innocent rather than the evil character of the organization to which they belong if the evidence revealed the possibility that either conclusion could be drawn. The following are examples of uncontradicted facts in the record herein from which knowledge of the innocent character of the Communist Party might be inferred, which respondent completely disregards in its brief.

(a) Respondent refers to many passages written many years ago in other countries. It ignores other passages in the very same books declaring that the general principles of Marxism-Leninism may not be mechanically and universally applied but, on the contrary, they must be applied differently under the different conditions. Moreover, "political writings are often over-exaggerated polemics bearing the imprint of the period and the place in which written" (*United States v. Schneiderman,* 320 U. S. 118, 154). Respondent's theory foists upon petitioners without evidence a literal interpretation of each

of the passages selected by respondent and their application directly to the United States at the present time, without regard to the aforesaid admonitions contained in the very books upon which respondent relies. (See P. Br. pp. 26-28.)

(b) The record reveals that all of the writings relating to violence are susceptible of the interpretation that they relate either to the use of the legal force and violence (police force and army) of a legally constituted state once power has been achieved, or to the use of force and violence in those countries and places where no democratic processes exist and where the majority can achieve its will in no other fashion (P. Br. pp. 24-25). Respondent's position is that without proof its interpretation of Marxist-Leninist writings must be attributed to petitioners and the other possible interpretations must be ignored. This position is insisted upon by respondent despite the testimony of its own witnesses that the proper interpretation of Marxist-Leninist writings is a difficult thing, that persons all over the world both within and without the Communist Party have differed on the question of such correct interpretation; and despite the fact that some of such witnesses themselves construed Marxism-Leninism and the policies of the Communist Party as being opposed to the use of force and violence as a means of accomplishing the revolutionary change to socialism and as predicting its occurrence only because of the possibility that a minority might attempt by force and violence to prevent the majority from having their way (P. Br. pp. 148-151).

(c) Respondent cites its Appendix A for the proposition that the Communist Party tolerated no doctrinal deviation from its tenets, least of all from the doctrine of

force and violence (R. Br. p. 106). To reach its conclusion respondent relies on its interpretation of selected passages from books and on incidents of several expulsions of individuals from the Communist Party which individuals sought to advocate the establishment of socialism without regard to the winning of a majority desiring socialism.[3] Yet when discussing this point, respondent disregards all of the evidence showing disagreements, discussion and shifts of policy which its own witnesses testified were constantly going on within the Party (R. Br. p. 83, n. 56; p. 173).

Simultaneously with this reliance upon the expulsion of "leftists," as noted above, the respondent relies upon statements made by some of these leftists within Party clubs as proving the nature and character of the Communist Party and its binding effect upon the petitioners. Thus respondent places great stress upon the views expressed concerning the 1934 Waterfront Strike and its relationship to revolution at a meeting of the club from which the "leftists" were expelled (R. Br. p. 143); the members of which club openly stated that they disagreed

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[3]This technique of respondent is one of twisting of every item of the evidence in such a way as to present it in a manner most unfavorable to petitioners. Respondent never presumes innocence if a supposition of guilt is conceivable. Here the expulsions relied upon show an opposition to those who were unwilling to wait until a majority were won for socialism before advocating its establishment and who thereby indicated their desire to by-pass the democratic processes. Those who opposed the expelled "leftists" did so not because they believed that a violent revolution was premature, as respondent suggests, but because they believed, as the Communist Party Constitution provides, that in a democracy, socialism can and should be achieved without violence by winning a majority for that objective (P. Br. pp. 42-43). In its brief respondent repeatedly refers to this evidence as proof of the tight control exercised by the Party over its members as part of a conspiracy to advocate the overthrow of the government by force and violence.

with the Party leadership (P. Br. p. 98). Thus at one and the same time petitioners' guilt is predicated in part on the expulsion of these leftists and in part on the views of the leftists who were later expelled. No more convenient device for a successful prosecution has ever been utilized. But it is wholly irrational to infer tht an organization advocates the overthrow of the government of the United States by force and violence because it will not accept members who advocate the establishment of socialism before a majority of the people have indicated a desire for such fundamental change.

(d) Respondent's summation of a group of outlines (R. Br. pp. 151-161) illustrates very well its selective method of analyzing the contents of writings. The following are examples of a few of the omissions: first, no reference is made by respondent to the statements in the outline supporting defense of "bourgeois democratic rights" as one of the principles of Marxism-Leninism, accompanied by the admonition that the struggle for democracy is essential for the establishment of socialism [Ex. 626, p. 13]; second, respondent refers to a portion of the outline dealing with socialism and which states in part "achieved through revolution" (R. Br. p. 155). The entire phrase from which these three words are extracted is "achieved through revolution—*i.e.,* a fundamental change in the class control of society." [Ex. 626, p. 24]; third, the summary completely omits the outline's quotations from the Constitution of the Communist Party stating that the aim of the Communist Party is "the establishment of socialism by the free choice of the American people" which language is followed immediately by the assertion that there is need for a Marxist-Leninist Party "capable of leading the working class and the ma-

jority of the people to the achievement of socialism. * * * role of Party in helping working class to see the need for socialism based on their own experience." This in turn is followed by a criticism of Browder because by his policies "the whole question of socialism is reduced to a mere abstraction" resulting in the abandoning of "the advocacy of socialism even in a purely educatioual sense"[4] [Ex. 626, p. 26]; fourth, in dealing with the meaning of Party discipline, respondent discusses the portion of the outline indicating that decisions once arrived at must be carried out, but not wtih that portion of the outline which states that the policy of strict discipline "presupposes criticism and contest of opinion within the Party. Least of all does it mean that discipline must be "blind" [Ex. 626, p. 29]; fifth, those portions of the outline dealing with the immediate program of the Communist Party and with the relationship of the program to the achievement of socialism is entirely overlooked. The outline states that the immediate object of the Communist Party is to "help the working class and the people as a whole to meet their urgent, immediate practical needs" which are listed as peace, democracy, jobs and security. The outline states that in fighting for these needs "favorable conditions are created for the masses of our people to recognize, on the basis of their own experience, the need for the eventual reorganizaton of society along so-

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[4]In this connection it should be noted that respondent's analysis of the outline goes into great detail with respect to references to selected writings of Marx, Lenin and Stalin. However, it simply disregards those portions of the outline which set forth the statements and position of the Communist Party of the United States. What is stressed by respondent is what Marx, Lenin and Stalin said; what is simply eliminated is what according to the outline the Communist Party said about how Marxism-Leninism should be applied to the United States.

cialist lines." All this is from a resolution of the National Committee of the Communist Party [Ex. 626, p. 34].[5]

(e) In discussing a second group of outlines, respondent concedes that they "contain statements purporting to repudiate the use of force and violence" (R. Br. pp. 161-164, 163) but belittles these statements on the grounds that the outlines were only *used* after the return of the indictment in the *Dennis* case and further asks the court to presume that the outlines were not *prepared* until after that time. These later outlines do indeed reject force and violence as a policy of the Communist Party and state that violence may occur where it is first used by a minority to prevent the expression of the democratic will of the people. Respondent assumes that these statements are inconsistent with the earlier outlines, but this assumption is based upon its own summation of those outlines which leaves out of the discussion that which is most important in them, *i.e.*, what the Communist Party said about its policies in the United States at the time that the outlines were written. When those statements are thrown into the scale, it appears clear that the later statements are merely a continuation of the expressions of policy calling for support of the democratic processes for the winning of the majority by education to socialism and for the establishment of socialism through the free will of the majority—all inconsistent with the advocacy of the overthrow of the government of the United States by force and violence.

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[5]Here again is an example of the total emphasis upon the writings of Marx, Lenin and Stalin, accompanied by the total disregard of the statements of the Communist Party of the United States.

The best that can be said for respondent's proof with respect to the alleged nature and character of the Communist Party is that from some of the excerpts in the Marxist books and writings distributed by it, some persons might conclude that these excerpts advocate a policy of overthrowing the government by force and violence. But at the same time other excerpts in the same books and writings and others distributed by it, including particularly the Constitution and Resolutions of the Communist Party of the United States, would lead other persons to conclude that the Party for the United States did not advocate the overthrow of the government by force and violence. Respondent's theory rests upon the assumption that the only possible conclusion from the evidence is that the Communist Party advocated the foreful overthrow of the government and that every person familiar with all of the writings and statements of the Party must have so understood. Otherwise even under its own theory the inference that petitioners because of their long-time activity and "leadership" in the Party must be assumed to have been part of the conspiracy charged is utterly without support. Thus one fatal defect in respondent's case is the failure to establish that the petitioners here adhered to that construction of Marxism-Leninism and that understanding of the nature and character of the Communist Party which respondent has adopted.

Moreover, the respondent's theory of imputed guilt rests, as petitioners demonstrated in their Opening Brief, upon an untenable and unlawful pyramid of illogical and baseless inferences (P. Br. pp. 146-158). Respondent has avoided any answer to petitioners' arguments on this issue.

C. Respondent asserts, however, that it does not rely exclusively upon the theory outlined above but that the record as to the petitioners contained independent evidence relating directly to each of them indicating their membership in the conspiracy. This conclusion arises out of the following fallacies, among others:

1. As to most of the petitioners an examination of respondent's summary of the evidence will reveal the complete absence of evidence of this kind.

2. With respect to the petitioner Schneiderman, respondent argues that the issue is whether the evidence shows that he was a knowing member of the alleged conspiracy between 1948 and 1951 and that what had happened a long time before then has no bearing on this issue (R. Br. p. 77). At the same time, respondent's case against all of the petitioners insofar as their individual conduct is concerned, and leaving to one side membership, officership and "leadership" in the Communist Party, rests virtually entirely upon evidence relating to periods falling outside of that covered by the indictment. As a matter of fact, there is only one incident relating to any petitioner falling within the statutory period which by any stretch of the imagination could be argued to have relationship to advocacy of force and violence. This is the incident involving petitioner Lambert in the City of Chico at the time when an F.B.I. agent was expelled on charges that among other things he was carrying a gun. Not only does respondent fail to answer the analysis of this incident contained in brief for petitioners (P. Br. pp. 72-77, 128-135) but by oversight it omits to mention that the significant part of the conversation, if indeed any part is significant, was admitted as to Lambert only and therefore cannot be relied upon to establish the conspiracy.

3. Here, too, respondent in analyzing the evidence selects those portions of the record favorable to its viewpoint and treats various incidents as though they were relatively clear and unequivocal although it appears from the testimony of its own witnesses that the opposite is true, or where there is clarity that it favors petitioners rather than respondent. The following are some examples: first, there are several instances in which the record reveals that some of petitioners taught Marxist-Leninist classes and in the course of such teachings referred to or used various Marxist-Leninist books. In none of these cases is there any evidence by respondent's witness, who in each case was present at the class, as to what any petitioner said during the class. All that the record shows is that certain books were used. Respondent then refers to certain selected passages from said books which it construes as advocating the overthrow of the government by force and violence, although there is evidence in the record that they can be construed in an opposite manner, and respondent then attributes the teaching of those passages thus construed to the petitioners teaching the classes involved. In each instance the respondent had a witness available who was present and knew what interpretation the petitioner teaching the class placed upon these writings and what if anything the petitioner said on the issues related to this case. It must be assumed that if any petitioner at any such class had said anything favorable to the government's case the witness would have so testified. The absence of such testimony is strong evidence that petitioners' conduct was innocent and not culpable, either because each petitioner construed the language involved differently than does the respondent or because each petitioner had chosen for discussion and emphasis passages other than those which re-

spondent has selected to include in its brief. Examples of this method of argumentation by respondent are: reference to testimony that petitioner Yates used Peter's Manual [Ex. 61-A] at a Party school in 1937 (R. Br. pp. 12-14);[6] the evidence that in 1945 Yates taught a class "in Marxism" without even indicating what books were used, let alone the passages therefrom. From this evidence respondent infers that petitioner Yates taught the entire subject of Marxism as construed by respondent upon the basis of passages it, not the petitioner, selects from various Marxist-Leninist writings (R. Br. p. 15). Respondent would draw similar inferences from evidence that petitioner Carlson on two occasions in 1946 taught "classes in Marxism" (R. Br. pp. 55-56). There is evidence of a speech by the petitioner Yates in which she spoke of Soviet forms of government and the necessity of the support of that form of government for Marxism to work. By inserting the word "Union" in brackets following the word Soviet, respondent converts the language into a meaning which it certainly does not have on its face (R. Br. p. 17).

Respondent directs attention to the fact that petitioner Yates together with petitioner Schneiderman prepared a study outline used in the "Marxist Institutes". [Ex. 163], but no attention is directed to the fact that this outline so prepared specifically states that the Communist Party is opposed to the use of force and violence in achieving

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[6]Incidentally, there is no evidence whatsoever that this book, Peter's Manual, was used at any time after 1937 either by petitioner Yates or any other person in the Communist Party. Yet on this kind of evidence that the book was used in a class three years before the Smith Act was adopted and ten years before the beginning of the running of the statute of limitations, respondent contends that connection with the conspiracy can be inferred.

socialism (R. Br. p. 19, Ex. 163, p. 8). This Government Exhibit, as respondent fails to note, is completely consistent with the testimony of petitioner Yates and there is no showing anywhere in the record that she ever said or did anything inconsistent therewith. In this connection it is important to note that respondent simply disregards Yates' own testimony and explanation of her understanding of Marxism-Leninism. Sole reliance is placed upon respondent's selection of material from Marxist-Leninist works and its construction of their meanings with no attempt to point out how, if at all, any of the evidence submitted on behalf of respondent contradicts to any extent petitioner Yates' interpretation of Marxism-Leninism.

Respondent refers to the evidence that at a Marxist class petitioner Spector assigned the book "Foundations of Leninism" for reading. It then follows its practice of quoting selected passages from that work as indicating what was taught by Spector on that occasion.[7] However, respondent forgets that the record shows that at the same time a book on the United Front was suggested for study and that this book, as distinguished from "Foundations of Leninism" refers directly to the United States and indicates that the road to socialist change as envisaged under Marxist-Leninist doctrine should be a peaceful one. (See R. Br. p. 31.) Thus even if respondent's method of attributing to a petitioner its interpretation of selected passages from books referred to by a petitioner in a class were otherwise defensible, at the very least consideration would have to be given to all of the books

[7]On this occasion too, as in others noted above, the witness was present during the class but gave not a single word of testimony as to what Spector said during the class.

assigned. And in a case such as this, where one book deals with general principles of Marxism-Leninism and another with a specific program for the United States, the only reasonable inference is that the specific program for the United States indicates what is believed to be the correct application of Marxism-Leninism to the United States.

Much emphasis is placed throughout the brief upon evidence of secrecy in the conduct of Communist Party meetings. Simply disregarded is the great volume of evidence indicating that such secrecy was necessary in order to protect members of the Communist Party against harassment, illegal interference, loss of jobs and actual acts of violence. Respondent would simply assume an evil motive for the secrecy, thus maintaining its consistency in disregarding the presumption of innocence and substituting on each issue of fact an assumption of guilt.

In dealing with the witness Estrada and his testimony that petitioner Carlson talked about Communist help to Negroes subjected to violent acts in the South, respondent disregards the fact that, after production of the F.B.I. reports involved, this witness was forced to admit that when Carlson talked about defense against fascist acts of violence Estrada interpreted it in his testimony as dealing with violent revolution. (See R. Br. p. 57, fn.)

An examination of the brief for petitioners will reveal that omissions of the kind last noted occur in virtually every incident relating to any petitioner dealt with in respondent's brief. Nevertheless, respondent asserts in its brief (p. 104) that petitioners committed many errors of omission in their brief, without specifying a single such omission.

4. Respondent contends that in discussing the sufficiency of the evidence petitioners raise issues of credibility of witnesses which was for the jury alone (R. Br. p. 104). This is not so. What petitioners urge is that the evidence lacked the solidity necessary to sustain a conviction in a prosecution invoking the First Amendment. What petitioners urge is that this prosecution, unlike the ordinary criminal case, involves First Amendment rights, and, as this Court has indicated, requires proof of personal guilt by "clear, convincing and unequivocal evidence" (P. Br. pp. 124-126). Not every fantastic tale of an informer, no matter how incredible and no matter how internally inconsistent and no matter how irreconcilable with other facts in the record or with a minimum level of common sense, is substantial enough to warrant the sustaining of a conviction where First Amendment rights are involved. One of several examples is the so-called Mother Bloor meeting discussed at page 35 and other places in respondent's brief. The nature of the testimony is indicated by respondent's own confusion with respect to it, for respondent refers to a "select group of Party officials" who attended this meeting. And in large part this is the effect that the witness' testimony was designed to have. However, the witness *who herself attended the meeting* had joined the Party only a few months before attending the meeting, held no office whatsoever in the Party, and would be the last person to be included in a "select group of Party officials." Moreover, the witness admitted that present at this meeting (which was announced by a printed invitation—one of which the witness received but failed to turn over to the F.B.I.) were non-Party members, and it is undenied that some persons who just casually dropped in were there. The witness' recitation of the speech given by Mother Bloor is as incon-

sistent as her testimony concerning the nature of the persons in attendance. As a reading of the testimony will show, it is inconceivable that a sane person could at one and the same time have said the absolutely irreconcilable things which Mother Bloor is reported to have said by the witness Van Dorn. Only by selecting part of the witness' testimony and disregarding the rest does it even begin to make sense. It is petitioners' position that the testimony of this witness must be considered in its entirety and the testimony that is virtually irrational lacks the solidity necessary to support a conviction in this case (P. Br. pp. 32-36; 141-143).

Moreover, there was uncontradicted proof in this record that the informers upon whom respondent relied were unmitigated prevaricators. The case here contains many instances where the informer witnesses either admitted they had perjured themselves or were proven to be testifying falsely as a matter of record.[7a] Respondent's case,

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[7a] Lautner stated that petitioner Richmond attended a convention of the Communist Party in 1945 [R. 1509]. Richmond was in the armed forces until March 6, 1946, and discharge papers show that Richmond while in the service was overseas in the European theatre [R. 2511]; Scarletto testified that in 1946 he had suffered from an injury sustained in the service [R. 3095] and had suffered with such injury until the time of the trial [R. 3096]. In an application for an insurance policy in 1948, he stated that he had had no previous injuries or consulted any physician [R. 3101-3102]; Scarletto testified that his first registration for voting was in 1942 [R. 3247]. In 1948, he registered again for voting and stated that he was registering for the first time [R. 3248-3250]; Scarletto stated that he saw petitioner Kusnitz at a meeting of the Los Angeles Committee for Protection of Foreign Born in September 1951 [R. 3317]. Government stipulated that petitioner Kusnitz was in jail because of inability to raise bail from July 26, 1951 to December 8, 1951 [R. 3319]; Van Dorn stated that she brought petitioner Dobbs up in the elevator many times during the latter part of 1944 and the year 1943 [R. 7983-4]. Dobbs was inducted into army on April 1, 1942, was shipped overseas on February 5, 1945 and returned to the United States on February 26, 1946

therefore, suffers not only from the failure to prove each of the petitioner's alleged guilt by "clear, convincing and unequivocal" proof, but it suffers from the additional infirmity that whatever evidence was adduced came from the lips of informers, obviously untrustworthy and unbelievable. These witnesses exemplified the tainted character of all informers, and the danger to the administration of justice of relying upon their testimony in any degree, particularly without scrutinizing the testimony with the utmost care (P. Br. pp. 129-135). Because of such danger, petitioners carefully analyzed each item of in-

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[R. 7986]; Estrada testified that he received no money from F.B.I. (other than expense money to come and testify) [R. 7253]. Government stipulated that Estrada received in 1947 the sum of $144.50 in connection with his services in reporting to F.B.I. [Ex. NA, R. 12,156, 12,155-62]; Evans received $4,086.68 as compensation for his services as an informer. He reported none of these earnings on his income tax returns (Pet. Br. p. 89); Wereb received $3,254.00 as payment from F.B.I. [Ex. NA, R. 12,155-62], but he did not include this money in income tax returns [R. 4020]; Scarletto identified Rev. Turner at the trial as Walter Martin who allegedly spoke at some meeting where Steinberg was present [R. 3288-89]; Wereb identified Lambert as Lima [R. 3949-50]; Rosser identified attorney Margolis as attorney Wirin [R. 5934-5] who had allegedly represented Rosser in some divorce proceedings; Estrada testified orally at trial concerning Carlson's statements about a "revolution in this country to overthrow the country by the Communist Party", but his contemporaneous written F.B.I. report showed that Carlson had referred to revolutionary action by Fascists and resistance to a fascist revolution. This, to Estrada, justified his testifying under oath that Carlson had called for a revolution by the Communist Party (P. Br. pp. 53-55); the witness Van Dorn testified that she had not given evidence before the grand jury which returned the indictment herein. In the subsequent Hawaii Smith Act trial, she testified that after the Los Angeles trial ended, she spoke to the trial judge, District Judge Mathes, and told him that she had not testified truthfully; that in fact she had been a grand jury witness prior to the trial in this case in Los Angeles. The Government in the Hawaii trial stipulated that Judge Mathes would testify that Van Dorn had never spoken to him after the Los Angeles trial nor had she ever told the Judge at any time that her testimony was not correct. Joint Opening Brief for Appellants in *Fujimoto et al. v. United States*, No. 13915, pp. 113-4, n. 4 on file in United States Court of Appeals for the Ninth Circuit.

former testimony of any consequence and noted the internal contradictions, the inherent improbabilities and the equivocal character of each of them, thus establishing that they lacked the "solidity" necessary to sustain the convictions. Respondent has made no attempt to deal with these analyses of the evidence but has cast them to one side as bearing merely upon credibility. The argument that they create too flimsy a fabric to sustain convictions involving First Amendment rights remains wholly unanswered.

D. Respondent's position is that advocacy, the subject matter of which was clearly legal and within the area protected by the First Amendment, is nevertheless proof of guilt in this case. Attention is directed to the fact that petitioners as members of the Communist Party participated in advocacy which raised grievances against the Government of the United States. These grievances, respondent argues, were advanced as the means of preconditioning people for violent revolution; accordingly, the advocacy of these grievances was a step in a conspiracy to overthrow the government by force and violence (R. Br. pp. 112-114). Long before the First Amendment was adopted this theory had been utilized as the grounds for suppressing all criticism of the Crown. It is an ancient device for suppressing dissent and destroying dissenters. It is precisely this invasion of freedom, among other things, that the First Amendment was designed to eliminate from our system of government. If speech which is innocent and which on its face is protected by the First Amendment may be punished because of the claimed intent of the speaker, the First Amendment can safely be relied on only by those who have no grievances to raise. Respondent thus inadvertently concedes what

petitioners contend the record has made clear all along—that the purpose and impact of these proceedings is to penalize these petitioners because they are members of an unpopular, small minority group, which over a long period of time has raised numerous grievances against the government of the United States.

## II.

## The Smith Act as Construed and Applied in This Case With Respect to the Issue of Incitement to Action Does Violate the First Amendment.

Respondent treats petitioners' argument as though their only complaint was that the trial court failed to use the word "incitement" in its instructions to the jury. To the contrary, the error complained of is that the instruction given to the jury in this case omitted all references to the necessity that the advocacy be directed to action. Not *once* did the trial judge mention the word "action" in his instructions; not *once* did he mention the right to advocate the abstract doctrine of forcible overthrow of the government. The distinction which the courts below drew, and which the respondent supports, is between the advocacy of forcible overthrow of government and the advocacy of non-forcible governmental change. But the jury was never told that the Smith Act, as construed by this Court in *Dennis*, does not punish all advocacy of forcible overthrow of government but only such advocacy when accompanied with a call for action directed towards that end. On this record, such an instruction to the jury would have required an acquittal. Instead, the jury were left free to convict upon the respondent's contention that the Marxist books, the Party and these petitioners at least advocated the abstract doctrine of forcible overthrow of the government.

Judge Medina partially defined the forbidden advocacy under the Smith Act as "the teaching and advocacy *of action* for the accomplishment of that purpose, by language *reasonably and ordinarily calculated* to incite persons *to such action.*" In this case the instruction given referred neither to advocacy of action nor to incitement to action. The whole concept that the speech must be directed toward the achievement of action is absent in the instructions that were given. Mere advocacy of the idea or concept of force and violence together with the requisite intent was under the trial court's instructions sufficient to sustain a conviction. That this is erroneous is virtually conceded by the respondent, although inadvertently. Thus it states (R. Br. p. 81) that the shade of meaning of the word "incite" which embodies "the idea of 'urging' the taking of some action, or 'moving to action by inducement or persuasion,' without any necessary implication as to when such action is meant to be or is urged to be taken" is correct. But the instruction as given made no reference to action at all and thus by respondent's own admitted standard it permitted an invasion of the First Amendment.

Respondent's argument that an instruction containing the word incitement might be misleading because it might lead the jury to believe that proof of advocacy of immediate action during the period covered by the indictment was essential for a conviction misses the beam. While respondent in all other sections of its brief seems to have clearly in mind the fact that the charge in this case is not present advocacy but rather a conspiracy to advocate in the future, in its argument with respect to the First Amendment respondent forgets this. What the First Amendment required, according to the *Dennis* case, was not proof that during the period of the indictment defen-

dants advocated force and violence in language of incitement to action; rather it was that during this period they agreed that at some time in the future they would engage in such advocacy. The instructions as given in this case permitted the jury to find the defendants guilty upon evidence that they agreed during the period of the indictment to advocate or urge in the future the idea that the Government of the United States should be overthrown by force and violence. It permitted such a conviction even though such planned advocacy and urging were to take place under conditions and circumstances where the defendants' ideas with respect to force and violence could still be answered by other ideas.

The gist of the crime charged here is that the defendants agreed that at some time in the future they would speak for the overthrow of the Government of the United States by force and violence under such circumstances and in such a manner that the language was calculated to instigate action, not merely to express an idea. All ideas, including the idea that the government should be overthrown by force and violence, fall within the protection of the First Amendment. It is only when words are used to induce action that the protection given by the First Amendment is lost. How immediately the precise action will follow the words is not the issue; rather it is whether the agreement is to use words calculated to proceed in an unbroken line to action without the intervention of further discussion. Because the instructions given failed to convey this concept, and not simply because the word "incitement" was not used, the statute as construed and applied ran counter to the First Amendment.

Respondent misconstrues the case of *Gitlow v. New York,* 268 U. S. 652 (R. Br. p. 84, fn.). It was not held

there that incitement was unnecessary; rather the court ruled that incitement "of certain persons" was not required. It was also held that the advocacy need not include "some definite or immediate act or acts." On the other hand, it was made equally clear that the speech had to be directed to action, the court saying: "It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of *action* for the accomplishment of that purpose." 268 U. S. at 665. (Emphasis added.) The Manifesto which was held illegal was described by the court in the following language: "It advocates and urges in fervent language *mass action* which shall progressively ferment industrial disturbances, and through political mass strikes and revolutionary *mass action* overthrow and destroy organized parliamentary government. It concludes with a call to action. * * *" Advocacy or urging, even of forcible overthrow of government, can be either part of a discussion or debate or it can be designated directly to induce the action without further discussion. It is this latter type of advocacy which is condemned in *Gitlow*. It is clarity on this point which was requested by petitioners and refused by the trial court. As a matter of fact, the court there stated that the language used on the basis of which the conviction was sustained "is the language of direct incitement." 268 U. S. at 665.

Respondent refers to the language of Mr. Chief Justice Vinson in the *Dennis* case that the Smith Act "is directed at advocacy, not discussion" (R. Br. p. 85). But immediately thereafter Judge Vinson notes that Judge Medina correctly instructed the jury that the statute was not aimed at "teaching and advocacy in the realm of ideas." (341 U. S. at p. 502.) It was this very distinction be-

tween teaching and advocacy in the realm of ideas and teaching and advocacy of action in language of incitement to action which Judge Medina made clear in his instruction and which was not set forth in the instructions given to the jury in this case.

III.

**The Rulings on Clear and Present Danger Are Contrary to the Requirements of the First Amendment.**

Respondent concedes: "It is possible that the trial judge did regard the jury's finding of the existence of this specific intent [to bring about the forcible overthrow of the government as speedily as circumstances would permit] on petitioners' part as sufficing, without more, to satisfy the 'clear and present danger' test." (R. Br. p. 87.) It is also conceded by respondent that such a finding of clear and present danger is deficient because it fails to take into account the objective conditions prevailing in the nation and the world during the relevant period. What is overlooked by respondent is that there are other objective elements in the clear and present danger test which require the trial judge's evaluation of the evidence presented, including the weighing of the credibility of the witnesses and the performance of those functions which initially must be undertaken on the trial level. Whether or not the petitioners had the power to bring about the evil and whether the nature of their activities was such as to constitute a "clear and present danger" were issues of fact, the determination of which depended upon the testimony before the trial judge. These issues he failed and refused to resolve. Even though such resolution may be part of the process of determining a "question of law"

it is intermixed with findings of fact necessitating an evaluation of the testimony at the trial level.[8]

In discussing the issue of whether or not petitioners had the power to bring about the evil, respondent misconstrues *Dennis*. The decision in that case was not predicated upon the proposition that the Communist Party had the power to initiate the action leading to an attempt at forceful overthrow of the government; rather it was found that collectively the petitioners there, by virtue of their control over the Communist Party, had that power. The group which was found to possess the necessary power in the *Dennis* case was the National Committee of the Party and the members thereof, the defendants in that case. Here, respondent argues: "If junior in rank to the *Dennis* petitioners, they nevertheless serve in the same army and were engaged in the same mission." (R. Br. p. 90.) But *Dennis* did not hold that all members of the Communist Party or all officers of the Communist Party merely by virtue of their membership or officership therein had the power to bring about the evil at which the statute is aimed. If the Communist Party be referred to as an army, then what *Dennis* was referring to was those who had command of the "army" and could determine its course of action. The defendants in the *Dennis* case, according to the finding upon which the Supreme Court acted, possessed such power of command and by virtue thereof had the power to bring about the evil. There is no evidence in this case that the petitioners individually, or collectively as the members of any group,

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[8]Of course, petitioners continue to urge their position that the evidence is patently insufficient to support a finding of "clear and present danger"; and that even if the trial court had examined the record and made a finding of "clear and present danger", it could not be sustained on appeal. (P. Br. pp. 271-273.)

had the power to set the Communist Party into motion toward the alleged illegal objective of the conspiracy. Moreover, there is no showing from their activities that petitioners were "engaged in the same mission" as were the defendants in *Dennis,* according to the findings upon which the Supreme Court in that case acted. If respondent's argument is accepted, it would appear that every member of the Communist Party from one holding no office of any kind whatsoever to the highest officers therein is "in the same army" and "engaged in the same mission" and therefore equally guilty with the defendants in *Dennis* of a conspiracy to violate the Smith Act, regardless of the individual's ability to move the Party in the direction of illegal action, even if he would, and regardless of the nature of his own activities within the Communist Party. In short, resondent's theory virtually outlaws the Communist Party and makes of every member thereof an indicted or unindicted conspirator. This, of course, is fully consistent with the approach taken by respondent in its argument that the evidence is sufficient to sustain the convictions. The problem which runs like a thread throughout every aspect of this case is whether it is individuals who are on trial in a Smith Act case or whether it is a trial of the Communist Party with a finding of its guilt automatically leading to a conviction of the defendants by virtue of their membership, officership and "leadership" in the Communist Party.

At the time of the trial in this case the existence of international conditions which the prosecution urges established a danger of an attempt at violent revolution greater than that which existed at the time when the *Dennis* case was tried (R. Br. pp. 71-72), created a basis for prophecy or prediction at best. But now it is not necessary to rely, at least to the same extent, upon such

uncertain methods for reaching a conclusion. Events have shown that the danger which many feared at that time has not matured, that peace has been established in the world, and that the prospects for peace in the future render remote the dangers which may have appeared so great in the past. A court deciding the issue of clear and present danger in 1951 had to work with the knowledge and tools then available. A court deciding that issue today should not limit itself if a better and more reliable basis for a decision is now available. Respondent argues, with respect to matters of which a court can take judicial notice, that this "international" element of the clear and present danger issue can be determined *de novo* in this case by this Court, both because it has not been determined by the trial court and because it deciding a question of law this Court should determine what the law is for itself. If that be so, then in making that determination this Court should no more rule out matters of which it can take judicial notice now bearing on that determination than it should ignore decisions which have been handed down since 1951. If this is done, then even if the question of the existence of a clear and present danger may be limited to the state of world affairs, no such danger can be found to actually have existed in 1951. Moreover, if the entire record is examined and all of the elements necessary to the finding of clear and present danger are evaluated, the lack of a clear and present danger from these petitioners in 1951 or at any other time demands a reversal of their convictions.

## IV.

## The Instructions of the Trial Judge With Respect to the Meaning of "Organize" Were Erroneous and Violated the Constitutional Rights of Petitioners.

Respondent urges that even if the instructions on the meaning of the word "organize" were erroneous and even though that portion of the charged conspiracy was barred by the statute of limitations, there is no prejudicial error because the jury was instructed that it could not find guilt unless it concluded that the petitioners had conspired to violate the Act both with respect to the conspiracy to engage in the illegal advocacy and in the illegal organization. In fact, the jury was never so specifically instructed. Moreover, this contention overlooks the essential aspects of the instructions. The jury was advised that in order to find that a defendant had become a member of the conspiracy, it was necessary for the evidence to establish "that the defendant willfully participated in the unlawful plan with specific intent to further the common purpose or design" [R. 13,745, App. Item 2(d), pp. 22-23]. Under this instruction participation in any aspect of the conspiracy charged and with respect to which the jury was instructed was sufficient to tie in any defendant to the conspiracy. Accordingly, if the jury believed that a defendant "willfully participated" in the "organize" aspect of the conspiracy as that was defined by the trial judge, that would be sufficient under the instructions to support a finding that the defendant was a member of the conspiracy. If, as petitioners contend, the "organize" instruction was erroneous, the prejudice flowing therefrom, is patent, particularly when the character of the evidence against individual petitioners is considered.

In addition, the jury was instructed that "any act committed by one of the conspirators to affect *an* object or accomplish *a* purpose of the conspiracy" constituted an overt act (emphasis added). One of the purposes of the conspiracy, as charged in the indictment, was to "organize" as therein alleged and, as far as the jury was concerned, to engage in that activity as it was defined by the trial judge in his instruction. Accordingly, the jury could well have found that the two overt acts concerning which there was some proof were committed to effect the "organize" object of the conspiracy, as that term was defined by the trial judge. Once again, prejudicial character of an erroneous instruction on this subject is patent, particularly in the light of the evidence concerning the two alleged overt acts set forth in the indictment concerning which there was some proof and in the further light of respondent's own argument that the said "overt acts" were sufficiently established because the two meetings involved constituted recruiting activities.[9]

In this connection it should also be recalled that the definition of the word "organize" given by the trial judge was not a limited one. He informed the jury that the word "includes" various activities such as recruiting, but he did not state what the outermost limits of the term were. Under his instruction any activity within the Communist Party could fall within the meaning of the word "organize." Under this broad and unlimited definition, the two public meetings of the Communist Party alleged to constitute the overt acts proved pursuant to the indictment could have been found by the jury to constitute overt acts simply by virtue of the fact that they were

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[9]Whether or not this is so will be discussed *infra* in the section of the Reply Brief dealing with the overt act aspect of the case.

activities of the Communist Party. Indeed, under this limitless definition of the word "organize," any defendant's connection with the conspiracy could be established by any activity of any kind as a member of the Communist Party. This is in complete harmony with the prosecution's theory that long-time membership and officership in the Communist Party on any level, plus innocent activities therein, was sufficient evidence of any defendant's participation in the conspiracy to justify and sustain a conviction.

Respondent further argues that the Smith Act must be construed in the light of its asserted Congressional purpose to destroy the Communist Party. The reasoning is that inasmuch as Congress intended the law to be applied to the Communist Party, the law must be construed in such a way that it will accomplish that purpose. This argument perverts the legislative and judicial processes. Legislation declaring certain conduct a crime must be deemed directed at that conduct and not at particular individuals or organizations. It is for the judicial process to determine whether the conduct complained of falls within the area of conduct condemned by Congress. The function of the judiciary is to determine whether the pattern of conduct falls within the scope of the legislation, not to pattern the legislation to fit the conduct. The latter requires treating the legislation as though it were directed at individuals or organizations instead of at some evil kind of conduct. So to construe legislation is to treat it as a bill of attainder.

## V.

## The Commission of Overt Acts in Furtherance of the Conspiracy Charge Within the Limitations Period Was Not Proved.

Respondent's assumption (R. Br. pp. 115-116) that petitioners would not question the sufficiency of proof of instances of overt acts had they been alleged in the indictment is unfounded. Even if the law were that the overt acts relied upon need not be alleged in the indictment, it is petitioners' position that there was no proof of a single overt act within the period of the statute of limitations. The examples cited by respondent as constituting sufficient overt acts (R. Br. pp. 115-116) do not meet the test. The preparation of the outlines for the "Marxist Institutes" by petitioners Yates and Schneiderman tend to prove innocence, not guilt, and certainly do not constitute an overt act directed towards the consummation of the object of the conspiracy, for these outlines, as is noted above, affirm opposition to the concept of the violent overthrow of our government. The incident involving petitioner Lambert, aside from the fact that the crucial evidence therein was limited to him and therefore could not be considered as proof of an overt act binding upon all of the petitioners, is fully dealt with in the brief for petitioners, pages 75-77 and 131-133, and respondent, in its brief, makes no attempt to answer petitoners' analysis of the evidence concerning this incident.

The reference to petitioner Carlson's attendance as an observer at a class of the "Marxist Institute" without one word of evidence as to what was said or done at this class as being sufficient evidence of an overt act underscores respondent's theory that anything done by any petitioner as a Communist or having any relationship to

Marxism is sufficient proof of the conspiracy and its execution. This is so, according to the respondent, even though it had a witness present at the class who could have testified to an advocacy or discussion or other conduct relating to the charge of advocacy of the overthrow of the government by force and violence, if there were any such facts to support the government's case. But without introducing a word of evidence on this subject, respondent asks the court to infer an overt act of advocacy of force and violence simply because one of the petitioners attended as an observer a class at which assumedly Marxism was discussed. The conclusion respondent would draw is sound only if the conspiracy embraces every member of the Communist Party and every person adhering to or interested in Marxism-Leninism.

Moreover, respondent does not contest the proposition that for the conviction to be sustained one of the overt acts set forth in the indictment within the period of the statute of limitations must have been proved by evidence sufficient to establish an act in furtherance of the conspiracy. Respondent argues that the two Lenin Memorial meetings which were proved as such alleged overt acts in this case were sufficient because "at such meetings as these * * * the Party was augmented and strengthened through the recruitment of new members" (R. Br. p. 117). There is absolutely no evidence in the record showing any recruitment at said meetings or resulting in any way therefrom. Respondent goes on, however, to urge that at such meetings the presentation of "hot" issues as "bait" was a method of interesting outsiders in the Party program "with the object of winning, if not new members, * * * at least 'passive allies'" (R. Br. p. 118). Clearly, then, any activity of the Communist Party is under this theory an overt act pursuant to a

conspiracy to advocate the overthrow of the government by force and violence, even if that act be supporting the provisions of the Bill of Rights. Thus the Communist Party is treated as though it were the conspiracy while at the same time the respondent concedes that this is not the charge, but that the charge is conspiracy to advocate and teach the overthrow of the government by force and violence. However, the argument is made that anything at all which is done through the Party is necessarily a step in that conspiracy. Accordingly, one must conclude, if this argument is accepted, that while being a member of the Communist Party is no crime, any act of any kind within the Party—innocent or protected, laudable or evil—makes one a conspirator to use the Party to advocate the overthrow of the government by force and violence. Logic would drive one even further. If, as respondent argues, recruiting a member into the Communist Party is an overt act in the conspiracy, it would seem to follow that remaining a member of the Communist Party is equally an overt act. If this be so, then respondent's argument leads it necessarily to the conclusion that mere membership itself is criminal.

The argument advanced by respondent that an eulogy of Lenin is an overt act in a conspiracy to overthrow the government of the United States by force and violence is indeed remarkable. There are undoubtedly many persons in this country and throughout the world who are not Communists and who admire Lenin—rightly or wrongly—as a great historical figure and a great thinker. One might ask whether all of these people, if they speak their mind, may be included in the conspiracy charged, or whether only Communists who express admiration for Lenin can be considered part of the conspiracy. Although the prosecution does not spell out its chain of

inferences with respect to this contention, they must run something like this: Lenin is the author of many of the extracts selected from writings upon which the respondent relies for the proposition that Marxism-Leninism must be construed as advocating the overthrow of the government of the United States by force and violence;[10] that the petitioner participating in the eulogy of Lenin must have read the same selected passages from the works of Lenin that have been cited by the respondent and construed them in the same way and ignored the other writings of Lenin, such as the examples set forth in the last footnote; that the eulogy of Lenin meant complete agreement with him (as his views are construed by the respondent) and indicated an intent to implement those views by advocating the overthrow of the government of the United States by force and violence; and that the eulogy was intended as a step in this direction. Such a series of inferences to the point of pure speculation would not support a conviction in any case, let alone one in which the First Amendment is involved. It should, of course, be noted that the record contains no evidence as to the content of the "eulogy," although the respondent had a witness present who undoubtedly would have testified to anything helpful to respondent's case.

The contention that the appeal for funds at one of the meetings rendered the meeting a step in a criminal con-

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[10]The selections are, of course, incomplete and carefully avoid such statements of Lenin as that his object during the period of the Kerensky Government was "to win a majority in the Soviets, to change the policy of the Soviets and through the Soviets to alter the composition and policy of the Government.

"This was a line envisaging a peaceful development of the revolution." [Ex. 28, R. 1362; R. 7034-5 at App. 68, pp. 257-8; R. 1491-2].

spiracy is simply another aspect of the argument that anything at all which is done to aid the Communist Party is part of an illegal conspiracy and in fact, if not in words, treats the Communist Party as the conspiracy.

It is not necessary in this case to determine the minimum requirements of an overt act in furtherance of the conspiracy. But certainly some connection to advocacy of the violent overthrow of the government must be established, not by speculation or by a series of untenable inferences or by construing protected speech as evil or by the adoption of the seditious conspiracy technique. Here the overt acts relied upon by the government established nothing more than protected legal organizational activity by an unpopular minority group, expresing views, some of which may have been extremely unpopular but none of which in any way ran afoul of the law.

## VI.

## Petitioners Were Deprived of a Fair Trial.

1. Respondent makes the point that the Philbrick articles made no direct reference to petitioners but concedes that they did refer to and deal with the "Communist Eleven" who were convicted in the *Dennis* case. Throughout the trial as in its briefs on appeal nd before this Court, respondent contended that petitioners were parties to the same conspiracy as the one found to exist in the *Dennis* case—or as they put it in their brief before this Court, they belonged to the "same army." Moreover, the articles both in their headlines and in the text talked about a "Communist conspiracy" to which all Communists allegedly belonged. There was no issue raised on the trial of this case as to the Communist Party membership of any of the petitioners. Under these circumstances it is

difficult to conceive how it can be cogently contended that the articles did not directly deal with a subject matter relating to the guilt or innocence of the plaintiffs on trial in the very case on trial—at least under respondent's theory of the case. It is true that the articles did not mention petitioners by name and did not say that it had been proved and established that they were guilty of the crime for which they were on trial. But they unmistakably said that all Communists (which would, of course, include these petitioners) were parties to a conspiracy to advocate the violent overthrow of our government.

Nor is the obvious prejudicial effect of such articles eliminated by the fact that the jurors were asked whether they had read these articles and answered in the negative. The articles continued to be published for a week thereafter and it would be surprising, indeed, if the jurors' attention were not directed to these articles during that week, precisely because of their participation as jurors in the trial. Nor was this probability lessened by the trial judge's admonition to the jury that they were not to read or listen to anything about the trial, for, as respondent itself argues, these articles did not deal with the trial. They simply assert that all Communists were engaged in the conspiracy charged in the indictment against the petitioners. Therefore compliance with the judge's admonition would not have resulted in the jurors refraining from reading the articles in question.

In 1951 when the trial began no one having any knowledge of the unpopularity of Communists could doubt that it would be difficult under any circumstances to obtain a fair trial for admitted members of the Communist Party charged with the violation of the Smith Act. To have the trial commence while articles like the Philbrick series were

in the process of being printed was to add an unnecessary and unfair obstacle in the way of the defense. The request for the 60-day postponement was a completely reasonable one and it could have been granted without in any way obstructing the course of justice, while taking a step reasonably possible in the direction of securing a verdict as free as the circumstances would permit from extraneous influences, pressures and prejudices.

2. An even more serious obstacle to a fair trial was the publication of the F.B.I. Memorandum, purporting to set forth "documentary proof" that the Communist Party teaches forcible overthrow of the government, on the eve of the case going to the jury and just as the defense had completed its arguments to the jury.

With respect to the Philbrick articles, the respondent argues that they did not mention the petitioners and for this reason the articles could not be prejudicial. With respect to the F.B.I. Memorandum, respondent states: "These quotations and comments [those appearing in the Memorandum] had all previously been received in evidence in this case" (R. Br. p. 124.)[11] But this, it would seem, is precisely the reason why the Memorandum was so extremely prejudicial. In effect what the respondent did was to permit a communication through the press from one of its high officials, a figure whose authoritative position in the

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[11]This is true of the quotations but not of the comments. There was no witness in the case who testified that the Communist Party advocated the forceful overthrow of the government of the United States by force and violence. To the contrary, one of respondent's witnesses testified that when he was a member and high official in the Party it was his understanding that it did not so advocate (P. Br. p. 95). What the Memorandum did include, insofar as comments are concerned, is all-out support of the government's argument with respect to the conclusions to be drawn from the evidence.

mind of the average American cannot be doubted, stating that after long study and after secret investigation by the Federal Bureau of Investigation, he had reached the conclusion that the quotations in evidence in the case on trial proved beyond any doubt that the Communist Party was engaged in a conspiracy to advocate the overthrow of the government by force and violence. And this communication was tendered to the jury through the press just as the defense had completed several days of argument contending to the contrary. If Mr. Hoover had been called as an expert witness during the trial it is doubtful whether he would have been permitted to express the conclusion which he set forth in his Memorandum. But even if he had, he would have been subjected to cross-examination and the defense would have had some opportunity to attempt to meet this testimony. But here this testimony was offered outside of court at a time when the defense had said its last word and when the prosecution was addressing the jury making the very argument which the Memorandum stated the F.B.I. had established to be conclusively true. A more serious interference with the processes of justice is difficult to imagine.

Respondent argues, however, that in any event the publication of the Memorandum could not be harmful because the position of the Federal Bureau of Investigation could not possibly have been a surprise to the jury. If this theory were correct, there would have been no prejudice if Mr. Hoover had written a personal letter to each member of the jury enclosing a copy of the Memorandum which was published in the press. The fact that the publication came through the press rather than through such a personal letter in no way alters the fact that such communication to jurors is not only irresponsible but must be condemned as a practice which will not be tolerated

under the American system of justice. The fact is, however, that until this publication the jury had no way of knowing that Mr. Hoover had made the study embodied in the Memorandum or that he had reached the conclusions there stated. They may have guessed or speculated at it, but they could not have known it. Nor could such guess or speculation possibly have had the impact upon the minds of the jurors as the publication of the Memorandum must have had. In any event, what the jurors might have believed before the Memorandum was published with respect to whether the Federal Bureau of Investigation advanced the contentions set forth in the Memorandum, whether prejudicial or not, could not be avoided. But the publication of this Memorandum at the precise time when it was calculated to do the most damage conceivable to petitioners' case could have been prevented; and it should have been.

Petitioners do not take the position, as respondent seems to believe (R. Br. p. 30), that all government agencies had to remain silent about the Communist question during the trial. As a matter of fact, an examination of the newspapers during the six-month period of the trial will undoubtedly reveal numerous governmental statements on the question of Communism with respect to which the petitioners did not during the trial and have not on appeal raised any question. But none of them, aside from the Philbrick articles, constituted a direct and flagrant intervention in the processes of the trial itself by dealing directly and immediately with the issues of the trial and by, in effect, telling the jury how the case should be decided.

Respondent is in error in asserting that petitioners "insisted that only a single inquiry be made, viz., whether any juror had read or heard about the matter; if the

answer should be in the affirmative, they maintained, the judge would be required automatically to declare a mistrial." (R. Br. p. 127). What petitioners did urge was that it was incorrect to make a single compound inquiry from which it could not be determined at all whether or not the jurors had ever read the article (P. Br. pp. 294-296). They insisted that the question as to whether the article had been read should have been asked separately as was done in the case of *United States v. Flynn,* 216 Fed. 2d 354, 374, relied upon by respondent (R. Br. p. 129), where all of the members of the jury were asked whether they had read the article and they all replied they had not. That was then the end of the matter. Similarly, if a question had been put to the jurors here as to whether they had read the article and all of them had replied in the negative, that would have been an end to the matter here. But if any of them answered in the affirmative, then it was petitioners' position that either they were entitled to a mistrial or at the very least to a searching inquiry as to what effect if any the reading of the articles had had upon the state of mind of the jurors. There was simply no reason for the insistence by the trial judge on the single compound inquiry.

What petitioners objected to was a question the very form of which and the very manner in which it was put invited not a careful inquiry into whether or not prejudice had resulted from the articles but a covering up of the entire incident by inviting negative answers from the jurors. The procedure followed in the *Flynn* case was the one which should have been followed here. The jurors should have been asked whether they read the article and if there had been any affirmative answers the matter should have been gone into carefully in order to determine with some degree of certainty whether prejudice had re-

sulted as far as the individual jurors who had read the article were concerned—indeed, if such jurors should not have been removed from the jury entirely and a mistrial granted if necessary. Anything less than such a searching inquiry of the jurors who admitted reading the article would have served merely to conceal its impact, not to reveal it and to correct the prejudice which had been created.

## VII.
## Conclusion.

Respondent's brief fails to meet the contentions advanced in petitioners' opening brief, and its arguments affirmatively establish the invalidity of petitioners' convictions.

The judgments of conviction should be reversed and the indictments as to each of the petitioners should be ordered dismissed.

Respectfully submitted,

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